BALACHANDRAN A/L SAMY & ANOR.

v.

CHEW MAN CHAN @ CHEW AH YEOW & ANOR.

HIGH COURT MALAYA, PENANG
TUAN VINCENT NG KIM KHOAY J
[CIVIL APPEAL NO. 12-117-93]
8 AUGUST 1995

TORT: *Fatal accident - Claim by dependents under s. 7(8) Civil Law Act 1956 - Dependents same set of people as claimants of estate - Estate not a party to action - Contributory negligence by deceased - Whether damages can be proportionately reduced as against the dependents under s. 12 (4) Civil Law Act 1956 when person liable or his estate is not a party to the action.*

JURISPRUDENCE: *Dichotomy between substantive law and procedural law - Section 12(4) Civil Law Act 1956 and Rules of the High Court 1980 O. 15 r. 6(2)(b) or O. 15 r. 6A - Effect.*

The respondents were the parents of a minor, Chew Chin Tong (the deceased), who died in a motor accident involving the appellants. As no probate action was taken in respect of the estate of the deceased, the respondents, pursuant to s. 7(8) of the Civil Law Act 1956, claimed damages as dependents for bereavement and funeral expenses.

The learned Sessions Court Judge found that the deceased was equally negligent but declined to proportionately reduce the damages awarded to the respondents under s. 12(4), Civil Law Act 1956 since the minor's estate was not a party to this action following the decision in *Veronica Joseph (F) An Infant & Anor. v. Tu Kon Lin* [1987] 1 CLJ 81 and ordered the appellants to pay damages in full. Hence the appeal.

Held:

[1] Section 12(4), Civil Law Act is merely a provision of substantive law that gives the power and jurisdiction to the Court to reduce the damages proportionate to any contributory negligence only when the relevant procedural law has been complied with eg. O. 15 r. 6(2)(b) or O. 15 r. 6A, Rules of the High Court 1980.

[2] To accept the contention that the estate of a deceased need not be a party to an action merely because it consists of the same set of people as the dependency claimants would be to defeat the purpose of procedural laws which are meant to have statutory force and are not mere rules of practice.

[3] The Court opined that s. 12 (4) read in the light of ss. 7, 8, 10 & 12(3), Civil Law Act 1956 shows the legislature's intention that the estate of a deceased must be made a party to an action before the Court can adjudicate on the question of contributory negligence and the reduction of damages.

[Appeal dismissed with costs].

Cases referred to:
Veronica Joseph (F), an Infant & Anor v. Ju Kon Lin [1987] 1 CLJ 81 ***(foll)***
Mallet & Anor. v. Dunn [1949] 1 AER 973 ***(refd)***
Maxfield v. Llewellyn [1961] 1 WLR 1119 ***(refd)***

Maimunah bte Hassan (sebagai wakil Harta Pusaka Rozita bte Khamis) & Satu lagi lwn. Marimuthu s/o Samanathan & 1 lagi [1993] 1 CLJ 119 - 124 ***(refd)***
Lim Chai Oon & Anor. v. Normah bte Ismail [1994] 2 AMR 33 ***(not foll)***
Pacific Centre Sdn. Bhd. v. United Engineers (Malaysia) Sdn. Bhd. [1984] 2 CLJ 56 ***(foll)***

Legislation referred to:
Civil Law Act 1956, ss. 7(8), 8, 10(1)(c), 12(1), (3), (4)
Rules of the High Court 1980, O. 15 r. 6(2)(b), O. 15 r. 6A

For the appellant - Palaniappan a/l M. Ramasamy; M/s. Bala Mahesan & Khairudin
For the respondents - N. Shanmugam; M/s. Shan & Gooi

JUDGMENT

Vincent Ng Kim Khoay J:

This was an appeal to the High Court from the decision of the Sessions Court over a case arising out of a road accident. The brief facts are as follows:

> Chew Chin Tiong, a minor, (hereinafter referred to as the deceased) died in a motor accident and his parents (the respondents) sued the appellants for bereavement and funeral expenses. It is understood that no grant of probate or letters of administration were obtained in respect of the estate of the deceased and by virtue of s. 7(8) of the Civil Law Act 1956 (the CLA) the respondents are now suing in their personal capacities as dependents.

The appellants pleaded contributory negligence on the part of the deceased and after a full hearing, the learned Sessions Judge found the appellants and the deceased were equally to be blamed. However, since the estate of the deceased was not made a party the learned Sessions Judge ordered the appellants to pay full damages based on the authority of the case *Veronica Joseph (F), an Infant & Anor. v. Tu Kon Lin* [1987] 1 CLJ 81 (hereinafter referred to as the *Veronica* case). At that time, the *Veronica* case was the only reported case on point and therefore no doubt, the learned Sessions Judge then rightly thought that he was bound by the decision in that case.

The only issue of law in the appeal purposely brought up before me, was whether or not proportionate reduction can be made in the damages awarded to the claimant under s. 12(4) of the CLA 1956 where the person liable for contributory negligence (or his estate if he had died) is not a party to the proceedings.

Section 7(8) of the CLA reads as follows:

> If there is no executor of the person deceased or there being an executor no action as in this section mentioned has, within six calendar months after the death of the person deceased, been brought by the executor, the action may be brought by all or any of the persons, if more than one, for whose benefit the action would have been brought if it had been brought by the executor, and every action so to be brought shall be for the benefit of the same person or persons and shall be subject to the same procedure as nearly as may be as if it was brought by the executor.

Mr Palani, Counsel for appellant exhorted the Court to answer the issue in the affirmative as he contended that s. 12(4) of the CLA clearly provided that any damages awarded to the dependents under s. 7 of the Act should be reduced proportionately to the extent of the deceased's liability in an accident.

Section 12(4) stipulated as follows:

> Where any person dies as the result partly of his own fault and partly of the fault of any other person or persons, and accordingly if an action were brought for the benefit of the estate under s. 8, the damages recoverable would be reduced under sub-section (1), any damages recoverable in any action brought for the benefit of the dependents of that person under s. 7 or for the benefit of the husband of that person under proviso (iii) of subsection (3) of s. 7 or of the spouse or parents under subsection (3B) of s. 7 shall be reduced to a proportionate extent.

Therefore, he submitted, s. 12(4) equally applied to actions under s. 7 and s. 8 of the Act.

In the *Veronica* case, the learned Wan Yahaya J (as he then was) addressed his mind to the issue and held that the plaintiffs therein were not persons suffering damages "as a result partly of their own fault" within the meaning of s. 12(1), CLA. He referred to the English cases of *Mallet & Anor. v. Dunn* [1949] 1 AER 973 and *Maxfield v. Llewellyn* [1961] 1 WLR 1119 in the latter case Ormrod LJ pronounced that:

> It appears to me that the Court must have regard to a person's responsibility for the damage having regard to the parties who are before the Court, whose share of the damage can be taken into account and who have had the opportunity of putting arguments for and against their share of blame and generally of being heard in the action.

Wan Yahya J had this to say on the operation of s. 12(4) of the CLA:

> I agree with Counsel that benefit to the dependents can be reduced to proportionate extent but will only apply where the action was brought "for the benefit of the estate under s. 8 of the Act " and not in the present case under s. 7. This section will not relieve the defendant from joining the administrator of the estate as a party if he wishes to establish contributory negligence on the part of deceased."

Consequently the Court in the *Veronica* case ordered the defendants to pay the full damages as the estate of the deceased was not made a party to the proceedings.

The second case on point, was *Maimunah bte Hassan (sebagai wakil Harta Pusaka Rozita bte Khamis) & Satu lagi lwn. Marimuthu s/o Samanathan & 1 lagi* [1993] 1 CLJ 119 -124, the learned Judge did not cite the *Veronica* case but observed that the estate of the deceased was not a party and awarded full damages.

However, 1994 saw a conflicting decision in the case *Lim Chai Oon & Anor. v. Normah bte Ismail* [1994] 2 AMR 33, wherein the learned Judge disagreed with the ratio in the *Veronica* case, as he was of the view that s. 12(4) CLA was sufficiently clear and unambiguous to allow the Court to make a reduction in the claim for damages made under s. 7 and s. 8 CLA. And, he saw no purpose being served by having to bring in the deceased estate as a party as virtually in all cases of this nature, the beneficiaries of the estate consist of the same set of people as the dependency claimants. The learned Judge foresaw a multiplicity of suits if the *Veronica* case was followed. I do agree that s. 12(4) CLA is clear and unambiguous, but only to the extent of substantive law.

It was Mr N. Shanmugam, Counsel for respondents' submission in the appeal before me, that the learned Judge in *Lim Chai Oon* had failed to appreciate that s. 12(4) of the CLA is a provision of substantive law and that the compliance of rules of procedure, which are also statutory in nature, are necessary where the defendant alleges contributory negligence on the part of a person who is not a party before the Court. It is also to be noted that s. 10(1)(c)

of the CLA provides that where damage is suffered as a result of a tort any tort-feasor may recover contribution from any other tort feasor. And, s. 12(3) of the CLA provides that s. 10 shall apply in any case where 2 or more persons are liable.

I am inclined to accept the *ratio decidendi* in the *Veronica* case as I agree with Mr Shanmugam that s. 12(4) CLA is merely a provision of substantive law that gives power and jurisdiction to the Court to reduce the damages proportionate to any contributory negligence on the part of the deceased. And, it is only when relevant procedural law had been complied with e.g. O. 15 r. 6(2)(b) or O. 15 r. 6A of the Rules of the High Court 1980 that the Court can be moved to invoke the power to reduce the damages.

It is essential to read the CLA in its entirety; and s. 12(4) ought to be read in the light particularly, of ss. 7, 8, 10 and 12(3) of CLA in order to determine the true intention of the legislature. Upon careful reading of such provisions I do not think that the legislature had intended by implication in s. 12(4) CLA to override the established procedural law in respect of reduction of damages on account of contributory negligence. It stands to reason that the estate of the deceased should be a party before the Court to enable the Court to adjudicate on the question of contributory negligence, whereby this issue itself could be pointedly tried and the personal representatives of the estate (who may or may not be the dependents of the deceased) given the opportunity to be heard, before the Court proceeds to reduce the damages awarded to the plaintiff.

Finally, I cannot agree that because the beneficiaries of the estate may consist of the same set of people as the dependency claimants, the estate of the deceased need not be made a party to the suit. The practical effect of this approach would be to ignore the established system of substantive law as distinct from procedural law in our statute books. It would defeat the purpose of having procedural laws, which were meant to have statutory force and are not mere rules of practice [see decision of Edgar Joseph Jr. J (as he then was) in *Pacific Centre Sdn. Bhd. v. United Engineers (Malaysia) Sdn. Bhd.* [1984] 2 CLJ 56.]

To conclude, my view is that unless it is clearly expressed in s. 12(4) CLA or in any other statutory provisions to the effect that the deceased's estate need not be made a party in an action under s. 7 of CLA, the Court should not brush aside the abiding dichotomy between substantive law and procedural law. It should be strictly maintained, as substantive law bestows rights to a person whereas procedural law determines the mode in which he should move the Court in order to enforce such rights. This is indeed the very essence and core basis of our jurisprudence and there is no compelling reason for me to take a novel approach against this established basis of our law.

Consequently, for the above reasons, I decided to dismiss the appeal with costs.